APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 97-0873

DWIGHT VINES, ET AL

VERSUS

NORTHEAST LOUISIANA UNIVERSITY, ET AL

JUDGE JAMES
MAGISTRATE JUDGE HAYES

REPORT AND RECOMMENDATION ON MOTION FOR PERMANENT INJUNCTION

Before the undersigned Magistrate Judge, on reference from the District Court, is a motion for permanent injunction filed by the defendants. (Document No. 285). For reasons stated below, it is recommended that the motion be **DENIED**.

The underlying facts of this matter have been set out numerous times in the record of these proceedings, and they will not be restated herein.

Defendants moved for a permanent injunction of the individual plaintiffs' state court proceedings on the grounds that this court dismissed the EEOC's federal complaint on summary judgment, and that the summary judgment on the federal claims was *res judicata* as to the individual plaintiffs'

state law claims. Prior to filing this motion, the defendants moved to dismiss the state court proceedings on the grounds of *res judicata.* The trial court granted that motion, but was reversed by the Second Circuit Court of Appeal. The defendants' application for writs to the Louisiana Supreme Court was denied.

A review of the ruling of the Louisiana Second Circuit shows that it is well-reasoned and persuasive. While recognizing that it had no precedential value in this state, the Second Circuit found persuasive and relied on the reasoning of *Victa v. Merle Norman Cosmetics*, 19 Cal.App. 4th 454, 24 Cal.Rptr.2d 17 (1993), in determining that there was no privity between the EEOC and the individual plaintiffs as follows:

> In this matter, after the Supreme Court decision in *Kimel*, the plaintiffs did not have the right to individually maintain an ADEA claim against a state agency. After *Kimel*, only the EEOC could prosecute the ADEA claim against the defendants in this case. Because the plaintiffs' individual ADEA claim had to be dismissed on those grounds, the federal court no longer had jurisdiction over the state claim which had been asserted by the plaintiffs. The matter was remanded to the state court. However, the *Kimel* decision specifically recognized the right of employees to sue under state statutory schemes. While the EEOC was the proper party to assert the ADEA claim, that agency did not prosecute any claim under state law. Further, as in *Victa*,

there is no showing that the EEOC had standing to prosecute such a claim under Louisiana law.

Also, we note that the EEOC apparently expanded the class of victims in the suit to include others similarly situated with the plaintiffs. The EEOC action was not prosecuted solely regarding the plaintiffs, and the commission was, in effect, representing the general public interest rather than those of the plaintiffs. Therefore, even under the reasoning of *Equal Employment Opportunity Commission v. United States Steel Corporation*, *supra*, it appears that *the* EEOC was not in privity with the plaintiffs because it sought to enjoin discrimination against a class of victims, not just the plaintiffs.

Further, the plaintiffs argue that they had no control over the conduct of the suit by the EEOC. They had no control over bringing or maintaining the ADEA action or in dismissing the appeal of the judgment against the EEOC.

Simply stated, the plaintiffs have a right to bring a suit under Louisiana's age discrimination statutes. The plaintiffs have not been afforded a full and fair opportunity to litigate their claims under state law and those claims have not been adjudicated on the merits. At the time the suit was brought, the plaintiffs sought to assert their state claims as well as federal claims. The state claims were remanded by the federal court on grounds of lack of jurisdiction. Under *Reeder v. Succession of Palmer*, *supra*, the plaintiffs did not fail to assert pendent state law claims.

All four elements of the *res judicata* test must be satisfied. Because there was no privity between the plaintiffs and the EEOC, we find that the parties in the two actions were not the same.

Vines v. Northeast Louisiana University, 839 So.2d 979, 985-89 (La.App. 2 Cir. 3/5/03), *writ denied*, 2003-1262 (La. 9/19/03).

It is recommended that this court adopt the above reasoning and DENY the motion for permanent injunction on the basis of lack of privity between the state court plaintiffs and the EEOC.

The individual plaintiffs also argue that, even if there was privity between the EEOC and the individual plaintiffs, the EEOC failed to adequately represent their claims, pointing out that the EEOC voluntarily dismissed its appeal of this court's granting of summary judgment. Under *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), so long as an appeal could not be characterized as patently meritless or frivolous, the failure to prosecute the appeal means that the representative in the prior suit did not vigorously and tenaciously protect the interests of the represented parties.

Given the unsettled state of the law, the lack of clear precedent regarding disparate impact cases under the ADEA, and the report and recommendation from the undersigned finding that there were factual issues precluding summary judgment, the appeal in the federal case could not be characterized as patently meritless or frivolous. Thus, the defendants' motion for permanent injunction should be **DENIED** on this basis as well.

Appendix

Under the provisions of 28 U.S.C. §636(b)(1)(C) and F.R.C.P. Rule 72(b), the parties have **ten (10) business days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within ten **(10) business days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED at Monroe, Louisiana, this 3rd day of October, 2003.

s/ Karen L. Hayes
Karen L. Hayes
United States Magistrate Judge

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No. 04-1615

IN THE

Supreme Court of the United States

DWIGHT VINES and VAN McGRAW,

Petitioners,

v.

UNIVERSITY OF LOUISIANA AT MONROE and BOARD OF SUPERVISORS OF THE UNIVERSITY OF LOUISIANA SYSTEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The Solicitor General agrees with the Petitioners and establishes that the Fifth Circuit erred in concluding that there was privity between the Equal Employment Opportunity Commission and the Petitioners thereby using a judgment against the EEOC under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, to act as a bar to Petitioners' state action age discrimination lawsuit under the doctrine of collateral estoppel. The Solicitor General correctly argues that the Fifth Circuit was wrong in its decision and that the Petitioners are truly aggrieved by that incorrect judgment enjoining their state age discrimination lawsuit under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283.

However, the Solicitor General mistakenly contends that the potential impact of this erroneous decision does not merit this Court's plenary review. To the contrary, the Fifth Circuit's erroneous decision directly conflicts with decisions of other circuit courts. Where the Solicitor General further is mistaken in his analysis is in postulating that these circumstances are not sufficiently important or occurring frequently enough to warrant the consideration of this Court. Despite the Solicitor General's assertion, the resulting effect will be significant given that this ruling would provide a mechanism to eliminate the state law age discrimination claims of individual litigants against state employers without those litigants ever having had their day in court. Given that the Fifth Circuit's opinion involves a section of the ADEA that mirrors a provision in the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201, *et seq.*, its ruling likely will reverberate beyond the ADEA to the FLSA.

A. The Fifth Circuit's Opinion on Collateral Estoppel Warrants Plenary Review because It Creates a Conflict within the Circuits.

A conflict exists between the circuits in two respects concerning the Fifth Circuit's decision. First, the Fifth Circuit posits a view of the right of a private litigant to prosecute a state age discrimination action filed prior to an ADEA action

by the EEOC which diverges from the interpretations of statutory construction of the applicable provisions in the ADEA in prior jurisprudence. Secondly, the Fifth Circuit's opinion strays from the existing case law regarding the discretionary application of the relitigation exception to the Anti-Injunction Act, generally, and as applied in the context of the ADEA and a state age discrimination lawsuit.

As the Solicitor General has demonstrated, the opinion of the Fifth Circuit is erroneous based upon the statutory history of the ADEA and the FLSA as well as the jurisprudence interpreting the statutes. The Fifth Circuit's decision is founded upon its particular interpretation of the legal question involving the existence of privity between the EEOC and a private litigant in the context of the issue of collateral estoppel. The judgment of the Fifth Circuit focuses on the legal question and does not depend upon the particular facts of the Petitioners' case. If this opinion of the Fifth Circuit is allowed to stand with the designation of "certiorari denied" as part of the citation, then it will either prompt other circuit courts to follow its incorrect reasoning or create a more definitive conflict in the circuit courts when other circuits attempt to rectify the Fifth Circuit's analysis.

In his brief, the Solicitor General proposed that whether there is a conflict in the circuits depends upon

> . . . whether Section 626(c) reflects a congressional intent to preserve a previously filed action as a fully independent remedy or whether it instead reflects a more limited purpose to provide a remedy that is unaffected by an EEOC judgment only when the individual action results in a judgment first or when the interests of the EEOC and the individual diverge.

With this latter interpretation, the Fifth Circuit has departed from Congressional intent and the jurisprudence by finding collateral estoppel to bar the individual employee's previously filed action unless there is a "clear divergence" of interests between the EEOC and the individual. The Petitioners have delineated that the circuit courts in *Burns v. Equitable Life*

Assurance Society of the United States, 696 F.2d 21 (2d Cir. 1982) and *EEOC v. Eastern Airlines, Inc.*, 736 F.2d 635 (11th Cir. 1984), have analyzed the issue by determining that Congress desired to retain a private litigant's ability to litigate despite litigation by the EEOC. In a situation completely analogous to the matter herein, the Ninth Circuit in *Merle Norman Cosmetics, v. Victa*, 936 F.2d 466 (9th Cir. 1991), reached a holding differing from that of the Fifth Circuit. Both the Ninth Circuit in *Merle Norman* and the Fifth Circuit herein were presented with a decision of the district court refusing to issue an injunction under the relitigation exception of the Anti-Injunction Act based on final judgment involving the EEOC. The Ninth Circuit found that the District Court's refusal to issue the injunction was within its discretionary power under the Anti-Injunction Act. By contrast, the Fifth Circuit did not recognize that the District Court's decision not to grant Respondents an injunction lay within its discretion.

The Second Circuit in *Burns* reviewed the legislative history of section 7(c) of the ADEA, 29 U.S.C. § 626(c)(1) to decide whether private suits under the ADEA were barred by a subsequent action pursuant to the ADEA by the EEOC. Noting that the ADEA also incorporates the procedures regulating enforcement of the Fair Labor Standards Act, the Second Circuit observed that the same language in this section of the ADEA originated in section 16(b) of the FLSA, 29 U.S.C. § 216(b) and provided that an employee's right to "bring" a lawsuit ceases when the official enforcing the FLSA initiates legal action. *Burns*, 696 F.2d at 23. The Second Circuit further explains that Congress is presumed to have knowledge of the interpretations given to an incorporated law, citing *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S. Ct. 866, 870 (1978), and that this inference is stronger given the proximity in time between the passage of the two provisions and the specification of certain sections for inclusion. The Second Circuit determined in *Burns* that the ADEA provided for previously filed private litigation to continue even though there has been later litigation by the EEOC. The

Solicitor General suggests that the Second Circuit later in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) ". . . adopted the view that the EEOC acts as a representative of private individuals when it seeks relief for them, and that view accords with the view of the court below." (Br. 14). However, the Second Circuit's view in *Kidder, Peabody* is circumscribed by the fact that the employees in *Kidder, Peabody* had handled their age discrimination claims through entering into binding arbitration agreements before the EEOC attempted to litigate on their behalf. These employees already had the opportunity to attempt to vindicate their own interests. This factual distinction underscores that individuals are entitled to handle their age discrimination claims without interference when they initiate the action before the EEOC litigation. This very opportunity is what the Petitioners seek with their lawsuit in state court.

The Eleventh Circuit also has articulated its interpretation of the viability of a private litigant's action in *Eastern Airlines* and it definitely runs counter to the Fifth Circuit's analysis. In the section of his brief demonstrating the error of the Fifth Circuit's conclusion that an EEOC judgment can bar a private employee's state action, the Solicitor General agreed with the reasoning of the Eleventh Circuit in *Eastern Airlines* that a subsequently filed EEOC lawsuit should not block an individual's litigation. Brief at 10. The specific language utilized by the Eleventh Circuit demonstrates that it believes that the private action must be allowed to continue to fruition, no matter the status of the EEOC lawsuit:

> Additionally, we disagree with Eastern's conclusion that Congress intended for an EEOC action enforcing the ADEA to cut off *previously* instituted private ADEA actions. Such a policy clearly would discourage attorneys from agreeing to file private ADEA actions on behalf of aggrieved individuals, since any such suit, no matter how close to resolution, or how much time spent, could be cut off by the EEOC filing a similar suit.

Eastern Airlines, 736 F.2d at 640. Later in his brief, the Solicitor General asserts that the Eleventh Circuit ". . . addressed only whether the commencement of an EEOC action terminates an individual's previously filed action, . . . and did not address the separate question whether a judgment against the EEOC operates as collateral estoppel in such an action." Brief at 15. However, as manifested in the opinion, the Eleventh Circuit articulates the chilling effect on the representation of private litigants by attorneys that would occur from utilizing the EEOC action to cut off a prior state action by individuals. This would include the use of an EEOC judgment to bar a private individual's litigation.

The Solicitor General incorrectly discounted the conflict that arises from the Fifth Circuit's decision with the prior holding of the Ninth Circuit in *Merle Norman*. There are clear parallels between the procedural history in the instant case and that outlined in *Merle Norman*. Both cases involved individuals who brought claims into state court prior to litigation by the EEOC. In each case, the determination in the EEOC action resulted in the dismissal of the claims for relief of the particular individuals on whose behalf the EEOC brought the action and the dismissal of the EEOC lawsuit with prejudice. The only pertinent difference is that the Ninth Circuit in *Merle Norman* appropriately allowed the District Court's refusal to issue an injunction to stand, while the Fifth Circuit substituted its evaluation for that of the District Court. The Solicitor General contends that "The Ninth Circuit never reached the question whether an EEOC judgment operates as collateral estoppel in an individual action brought under state law." Br. at 15. The Ninth Circuit never addressed this issue because it properly evaluated the question of the issuance of the injunction under the Anti-Injunction Act by referring to this Court's decisions in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988), *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 474 U.S. 518, 106 S. Ct. 768, 33 L. Ed. 2d 552 (1986) and *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977). The Ninth Circuit

explained that the issuance is discretionary by quoting from *Chick Kam Choo*, "the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." (emphasis included) *Chick Kam Choo*, 486 U.S. at 145, 108 S. Ct. at 1690.

In deciding whether to issue an injunction under the Anti-Injunction Act, the Ninth Circuit noted that ". . . district courts must be guided by 'general principles of equity, comity, and federalism,'" citing *Parsons Steel*, 474 U.S. at 526, 106 S. Ct. at 768, 88 L. Ed. 2d 877 (which also cited *Mitchum v. Foster*, 407 U.S. 225, 243, 92 S. Ct. 2151, 2162, 32 L. Ed. 2d 705 (1972). The Ninth Circuit concluded the following:

> . . . the district court acted entirely within its discretion when it determined that because nothing prevented Merle Norman from raising its defenses of res judicata or collateral estoppel in the California courts, it would not issue an injunction. State courts are just as capable as federal courts in applying applicable law. Doubts about the propriety of an injunction should be resolved "'in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.'"

Merle Norman, 936 F.2d at 468, citing *Bechtel Petroleum v. Webster*, 796 F.2d 252, 253 (9th Cir. 1986), quoting *Vendo Co. v. Lecktro-Vend Corp.*, 433 U.S. at 630, 97 S. Ct. at 2881, 53 L. Ed. 2d at 1009. The Ninth Circuit endorsed its analysis concerning the relitigation exception as recently as December 19, 2005 in *Brother Records, Inc. v. Alan Jardine*, No. 04-55096, __ F.3d __ (9th Cir. 2005).

The Fifth Circuit clearly departed from this Court's standards for the issuance of an injunction under the Anti-Injunction Act. There was no consideration by the Fifth Circuit of the standards articulated by this Court in *Chick Kam Choo* about the discretionary nature of the injunctive remedy that the Respondents sought. The Fifth Circuit ignored the principles of equity, comity, and federalism in deciding to foreclose review of the issues of res judicata and collateral estoppel by the state courts, despite this Court's statements in *Parsons Steel* and *Leckro-Vend*.

Prior to *Merle Norman*, the Ninth Circuit in *Bechtel Petroleum* considered whether an injunction should issue to bar the state lawsuit of individual employees after the Secretary of Labor had brought an action for wage-hour claims under the FLSA. Noting the discretionary nature of the remedy, the Ninth Circuit also explained that the District Court was in a better position to evaluate the circumstances when it denied the injunction. The Ninth Circuit adopted the opinion of the District Court which determined whether the Secretary and the employees were in privity and whether the Secretary had any power to handle their state wage-hour claims. The Court in *Bechtel Petroleum* also observed that the state courts should be allowed to determine the issues of res judicata and collateral estoppel.

B. The Fifth Circuit's Opinion on Collateral Estoppel Warrants Plenary Review because of the Impact of This Issue on Private Litigants' Rights in Age Discrimination and Fair Labor Standard Act Litigation.

The Solicitor General clearly supports the position of the Petitioners that the Fifth Circuit improperly found privity between the EEOC and the Petitioners to justify imposing collateral estoppel to bar the Petitioners' state age discrimination lawsuit. He underestimates the breadth of the situations to which this ruling would apply. Following this Court's ruling in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), private individuals were no longer allowed to sue a state under the ADEA. Only the EEOC was permitted to sue a state for age discrimination under the ADEA. This Court specified that the private individuals could only maintain an action in a state court for age discrimination pursuant to state law. Prior to the *Kimel* decision, private actions in Federal court under the ADEA could be consolidated with EEOC lawsuits pursuant to the same statute and the actions potentially could be prosecuted simultaneously. Since the holding in *Kimel* in 2000 and its reverberations through the cases pending in the circuit courts, there is greater opportunity and probability for

age discrimination litigation by the EEOC and private litigants to be conducted in two separate forums.

Since this Court's ruling in *Kimel* restricts individuals suing the state for age discrimination to actions under state statutes, the Fifth Circuit's ruling in this case bears most heavily on this class of litigants. The Fifth Circuit's decision presents litigants with a difficult choice. An individual suing the state for age discrimination must file a charge of discrimination with either the EEOC or the state fair employment practices agency. A litigant may be concerned about the integrity and validity of an investigation conducted by an agency of the state. Under the Fifth Circuit's holding, the filing of a discrimination charge with the EEOC brings with it the possibility of litigation by the EEOC and the prospect of being estopped from handling the litigation if the EEOC lawsuit is concluded first. Because the EEOC chooses to litigate in Federal court where litigation usually is concluded more quickly, there is a significant chance that the individual's state lawsuit would be rendered moot by the judgment in the EEOC litigation, even though he had no control over its handling. Although initially individuals will not be aware of the potential detrimental outcome from selecting the EEOC to investigate, the significance will be driven home when defendants, utilizing the Fifth Circuit's holding herein, block their private lawsuits with the relitigation exception. When presented with the consequences of each choice, private litigants may decide to forego informing the EEOC of allegations of age discrimination for fear of losing control of their personal claims. The EEOC then will lose the opportunity to appropriately enforce the ADEA with respect to state governmental entities and their employment practices.

The Fifth Circuit's opinion runs counter to the holding of this Court in *Kimel* that private litigants' claims of age discrimination against the state under state laws can be brought and maintained in state court separately and distinctly from lawsuits by the EEOC under the ADEA. *Kimel*, 528 U.S. at 91, 120 S. Ct. at 650. Allowing the Fifth Circuit's opinion to stand uncorrected would result in defendants having the ability to